

JS 44 (Rev. 11/04)

## CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

## I. (a) PLAINTIFFS

ROBERT SCHOELZEL

## DEFENDANTS

ASBESTOS DEFENDANTS

(b) County of Residence of First Listed Plaintiff \_\_\_\_\_  
(EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorney's (Firm Name, Address, and Telephone Number)

County of Residence of First Listed Defendant \_\_\_\_\_  
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE  
OF LAND INVOLVED.

Attorneys (If Known)

**EDL E-filing  
ADR**

## II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff  
☐ 2 U.S. Government Defendant  
☒ 3 Federal Question (U.S. Government Not a Party)  
☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

## III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   | PTF                                   | DEF                        |   | PTF                        | DEF                                   |
|---|---------------------------------------|----------------------------|---|----------------------------|---------------------------------------|
| Citizen of This State                   | <input checked="" type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4            |
| Citizen of Another State                | <input type="checkbox"/> 2            | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3            | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6            |

## IV. NATURE OF SUIT (Place an "X" in One Box Only)

| CONTRACT   | TORTS   | FORFEITURE/PENALTY   | BANKRUPTCY  | OTHER STATUTES   |
|--|---|--|---|--|
| <input type="checkbox"/> 110 Insurance<br><input type="checkbox"/> 120 Marine<br><input type="checkbox"/> 130 Miller Act<br><input type="checkbox"/> 140 Negotiable Instrument<br><input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment<br><input type="checkbox"/> 151 Medicare Act<br><input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans)<br><input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits<br><input type="checkbox"/> 160 Stockholders' Suits<br><input type="checkbox"/> 190 Other Contract<br><input type="checkbox"/> 195 Contract Product Liability<br><input type="checkbox"/> 196 Franchise | <b>PERSONAL INJURY</b><br><input type="checkbox"/> 310 Airplane<br><input type="checkbox"/> 315 Airplane Product Liability<br><input type="checkbox"/> 320 Assault, Libel & Slander<br><input type="checkbox"/> 330 Federal Employers' Liability<br><input type="checkbox"/> 340 Marine<br><input type="checkbox"/> 345 Marine Product Liability<br><input type="checkbox"/> 350 Motor Vehicle<br><input type="checkbox"/> 355 Motor Vehicle Product Liability<br><input type="checkbox"/> 360 Other Personal Injury<br><b>PERSONAL INJURY</b><br><input type="checkbox"/> 362 Personal Injury - Med. Malpractice<br><input type="checkbox"/> 365 Personal Injury - Product Liability<br><input checked="" type="checkbox"/> 366 Asbestos Personal Injury Product Liability<br><b>PERSONAL PROPERTY</b><br><input type="checkbox"/> 370 Other Fraud<br><input type="checkbox"/> 371 Truth in Lending<br><input type="checkbox"/> 380 Other Personal Property Damage<br><input type="checkbox"/> 385 Property Damage Product Liability | <input type="checkbox"/> 610 Agriculture<br><input type="checkbox"/> 620 Other Food & Drug<br><input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881<br><input type="checkbox"/> 630 Liquor Laws<br><input type="checkbox"/> 640 R.R. & Truck<br><input type="checkbox"/> 650 Airline Regs.<br><input type="checkbox"/> 660 Occupational Safety/Health<br><input type="checkbox"/> 690 Other<br><b>LABOR</b><br><input type="checkbox"/> 710 Fair Labor Standards Act<br><input type="checkbox"/> 720 Labor/Mgmt. Relations<br><input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act<br><input type="checkbox"/> 740 Railway Labor Act<br><input type="checkbox"/> 790 Other Labor Litigation<br><input type="checkbox"/> 791 Empl. Ret. Inc. Security Act | <input type="checkbox"/> 422 Appeal 28 USC 158<br><input type="checkbox"/> 423 Withdrawal 28 USC 157<br><b>PROPERTY RIGHTS</b><br><input type="checkbox"/> 820 Copyrights<br><input type="checkbox"/> 830 Patent<br><input type="checkbox"/> 840 Trademark<br><b>SOCIAL SECURITY</b><br><input type="checkbox"/> 861 HIA (1395ff)<br><input type="checkbox"/> 862 Black Lung (923)<br><input type="checkbox"/> 863 DIWC/DIWW (405(g))<br><input type="checkbox"/> 864 SSID Title XVI<br><input type="checkbox"/> 865 RSI (405(g))<br><b>FEDERAL TAX SUITS</b><br><input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant)<br><input type="checkbox"/> 871 IRS - Third Party 26 USC 7609 | <input type="checkbox"/> 400 State Reapportionment<br><input type="checkbox"/> 410 Antitrust<br><input type="checkbox"/> 430 Banks and Banking<br><input type="checkbox"/> 450 Commerce<br><input type="checkbox"/> 460 Deportation<br><input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations<br><input type="checkbox"/> 480 Consumer Credit<br><input type="checkbox"/> 490 Cable/Sat TV<br><input type="checkbox"/> 810 Selective Service<br><input type="checkbox"/> 850 Securities/Commodities/Exchange<br><input type="checkbox"/> 875 Customer Challenge 12 USC 3410<br><input type="checkbox"/> 890 Other Statutory Actions<br><input type="checkbox"/> 891 Agricultural Acts<br><input type="checkbox"/> 892 Economic Stabilization Act<br><input type="checkbox"/> 893 Environmental Matters<br><input type="checkbox"/> 894 Energy Allocation Act<br><input type="checkbox"/> 895 Freedom of Information Act<br><input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice<br><input type="checkbox"/> 950 Constitutionality of State Statutes |

## V. ORIGIN (Place an "X" in One Box Only)

- ☐ 1 Original Proceeding  
☒ 2 Removed from State Court  
☐ 3 Remanded from Appellate Court  
☐ 4 Reinstated or Reopened  
☐ 5 Transferred from another district (specify)  
☐ 6 Multidistrict Litigation  
☐ 7 Appeal to District Judge from Magistrate Judgment

## VI. CAUSE OF ACTION Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

28 U.S.C. § 1442(a)(1) (GOVERNMENT CONTRACTOR IMMUNITY-ACTING UNDER DIRECTION OF FEDERAL OFFICERS)

Brief description of cause:

## VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION DEMAND \$ \_\_\_\_\_  
UNDER F.R.C.P. 23

☐ CHECK YES only if demanded in complaint:  
JURY DEMAND: ☒ Yes ☐ No

## VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE \_\_\_\_\_

DOCKET NUMBER \_\_\_\_\_

DATE  
June 27, 2008

SIGNATURE OF ATTORNEY OF RECORD

*[Signature]* EVAN C. NELSON

FOR OFFICE USE ONLY

RECEIPT # \_\_\_\_\_ AMOUNT \_\_\_\_\_ APPLYING IFP \_\_\_\_\_ JUDGE \_\_\_\_\_ MAG. JUDGE \_\_\_\_\_

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CARRIER CORPORATION

E-filing

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

EDL

ROBERT SCHOELZEL,

Plaintiff,

v.

ASBESTOS DEFENDANTS, As Reflected on  
Exhibits, et al.,

Defendants.

Case No. 08

3113

DEFENDANT CARRIER  
CORPORATION'S NOTICE OF  
REMOVAL OF ACTION UNDER 28  
U.S.C. § 1442(a)(1) (GOVERNMENT  
CONTRACTOR IMMUNITY-ACTING  
UNDER DIRECTION OF FEDERAL  
OFFICERS)

TO THE HONORABLE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS OF  
RECORD:

Defendant Carrier Corporation ("Carrier") hereby gives notice of removal of the above-  
entitled action from the Superior Court of the State of California for the County of San  
Francisco, to the United States District Court for the Northern District of California pursuant to  
28 U.S.C. §§ 1442(a)(1) and 1446. In support of its removal, Carrier respectfully offers the  
following:

**Preliminary Matters**

1. On or about June 30, 2006, Plaintiff Robert Schoelzel filed a Complaint in this action, bearing Case No. CGC-06-453669, against numerous defendants in the Superior Court of the State of California for the County of San Francisco. A true and correct copy of the Complaint and all state court pleadings served on Carrier are attached hereto as Exhibit A.<sup>1</sup>

2. A copy of the Register of Actions identifying all state court pleadings filed prior to Carrier's Answer to Complaint is attached hereto as Exhibit B.

3. On March 5, 2008, Plaintiff filed an Amendment to Complaint naming Carrier Corporation for the first time as DOE number 9. A true and correct copy of the Amendment to Complaint filed on March 5, 2008, is attached hereto as Exhibit A.

4. The Complaint alleges that Plaintiff's disease was caused by his exposure to asbestos and asbestos-containing products, and that said exposure occurred at various locations inside and outside of the State of California.

5. A basis for removal jurisdiction by Carrier was not apparent in the Complaint or any subsequent amendments thereto. The Complaint did not specify what products designed, manufactured, or distributed by Carrier were alleged to have contributed to Plaintiff's injuries. None of the pleadings or other documents received by Carrier put Carrier on notice that there was a federal officer issue.

6. Carrier first ascertained the removability of this case upon receipt of Plaintiff's responses to interrogatories propounded by Carrier. On June 3, 2008, Plaintiff served responses to form interrogatories and special interrogatories in which he alleged for the first time that his disease was caused in part by exposure to asbestos fibers while removing Carrier air-conditioning equipment on the United States Navy ships USS Waddell (DDG-24) and USS Truxton (CGN-35), while he was employed by the United States Department of Defense. A true

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<sup>1</sup> All exhibits referenced herein are being filed concurrently herewith as a separate document.

1 and correct copy of Carrier's Form Interrogatories and Special Interrogatories, and Plaintiff's  
2 responses thereto, are attached hereto as Exhibit C.

3 7. Carrier equipment, including air-conditioning and refrigeration plants, aboard  
4 U.S. Navy vessels were specifically designed and manufactured in accordance with  
5 specifications provided by the U.S. Navy. This equipment was designed and built under the  
6 direction and control of the U.S. Government and its officers. Plaintiff's responses to  
7 interrogatories, alleging exposure from his work on Carrier air-conditioning equipment aboard  
8 the USS Waddell and USS Truxton, put Carrier on notice for the first time that this case is  
9 removable on the basis of federal officer removal jurisdiction under to 28 U.S.C. § 1442(a)(1).

10 8. This Notice of Removal is timely. If grounds for removal is not apparent in the  
11 initial pleading, the 30-day removal period prescribed by 28 U.S.C. § 1446(b) begins to run  
12 when the defendant receives a copy of an amended pleading, motion, order or other paper from  
13 which it may first be ascertained that the case is removable. 28 U.S.C. § 1446(b). Neither the  
14 Complaint nor any subsequent amendments thereto stated any grounds for removal to federal  
15 court by Carrier. Plaintiff's responses to interrogatories propounded by Carrier, served on June  
16 3, 2008, put Carrier on notice for the first time that Plaintiff's claims involve his alleged  
17 exposure to asbestos in military equipment built by Carrier for the U.S. Government pursuant to  
18 specifications provided by the U.S. Navy and under the direction and control of the U.S.  
19 Government and its officers. As this Notice of Removal is being filed within thirty days of  
20 Carrier's receipt of Plaintiff's responses, it is timely under 28 U.S.C. § 1446(b).

#### 21 **Nature of the Case**

22 9. This case is based on Plaintiff's allegations that he contracted a disease as a result  
23 of his exposure to asbestos dust and/or fibers.

24 10. Plaintiff asserts claims against Carrier for Negligence, Strict Liability, and False  
25 Representation.



**Jurisdiction, Venue and Intradistrict Assignment**

11. Jurisdiction is based on 28 U.S.C. §§ 1331 and 1442(a)(1) as set forth below under Grounds for Removal.

12. Venue is proper in the Northern District of California because the state court action, which is subject to this removal petition, was filed in the Superior Court of California for the County of San Francisco.

13. Furthermore, §1442(a) authorizes such a removal without the consent of any other defendant. *See Ely Valley Mines, Inc. v. Hartford Acc. & Indem. Co.*, 644 F.2d 1310, 1314-1315 (9th Cir. 1981) (“federal officer...can remove without other defendants joining the petition, and the entire case is removed to the federal court”).

**Grounds for Removal**

14. This is a civil action over which this Court has original jurisdiction under 28 U.S.C. § 1331, and is removable to this Court by Carrier pursuant to 28 U.S.C. § 1442(a)(1) in that Plaintiff’s alleged right to relief depends on the resolution of a substantial question of federal law.

15. Carrier was at all relevant times a “person” within the meaning of 28 U.S.C. § 1442(a)(1). *Fung v. Abex Corp.*, 816 F.Supp. 569, 572 (N.D.Cal. 1992) (finding that a corporate defendant was a “person”).

16. Carrier was acting under the direction of an officer of the United States within the meaning of 28 U.S.C. § 1442(a)(1) in designing, manufacturing and supplying air-conditioning and refrigeration equipment for and to the U.S. Navy. The air-conditioning and refrigeration equipment were designed and manufactured pursuant to precise specifications provided by the U.S. Navy, and therefore Carrier has a colorable federal defense to Plaintiff’s state tort claims. (See Declaration of Admiral Roger B. Horne, Jr., attached hereto as Exhibit D; and Declaration of Thomas McCaffery, attached hereto as Exhibit E.)

17. Should Plaintiff file a motion to remand this case, Carrier respectfully requests an opportunity to respond more fully in writing, but offers the following authorities at this time:

1           18. Removal pursuant to 28 U.S.C. § 1442(a)(1) is appropriate where the moving  
2 party can (1) demonstrate that it acted under the direction of a federal officer, (2) raise a  
3 colorable federal defense to plaintiff's claims, and (3) demonstrate a causal nexus between  
4 plaintiff's claims and the acts it performed under color of federal office. *See Mesa v. California*,  
5 489 U.S. 121, 124-25, 129-31, 134-35 (1989); *Fung v. Abex Corp.*, 816 F.Supp. 569 (N.D.Cal.  
6 1992); *Machnik v. Buffalo Pumps, Inc.*, 506 F.Supp.2d 99, 102 (D.Conn. 2007). Here, Carrier  
7 has satisfied all three requirements and is entitled to the federal officer removal provision.

8           19. Carrier was acting under the direction of agents and officers of the United States  
9 Government within the meaning of 28 U.S.C. § 1442(a)(1) in designing, manufacturing and/or  
10 supplying air-conditioning and refrigeration equipment for use on U.S. Navy ships pursuant to  
11 precise specifications exclusively prepared, drafted and issued by the U.S. Government through  
12 NAVSEA and/or BUSHIP. (Horne Decl., Exhibit D, ¶¶ 5-6, 11; McCaffery Decl., Exhibit E, ¶  
13 8.) The military specifications address all aspects of material requirement, including the  
14 materials to be used and whether the materials were to contain asbestos. (Horne Decl., Exhibit  
15 D, ¶ 11, McCaffery Decl., Exhibit E, ¶¶ 10-12.) To the extent that any piece of naval equipment  
16 built and supplied by Carrier contained asbestos, it would have been specifically required and  
17 approved by the U.S. Navy. (McCaffery Decl., Exhibit E, ¶¶ 10-11.) Any material, feature or  
18 component used in conjunction with equipment built and supplied by Carrier for use on a naval  
19 ship was specifically reviewed and approved by the U.S. Navy. (*Ibid.*) Furthermore, any change  
20 to the specifications was controlled by the U.S. Navy. (Horne Decl., Exhibit D, ¶ 11.) In fact,  
21 the Navy frequently required changes in design, materials and documentation before approving  
22 the design and authorizing the manufacture of the equipment. (McCaffery Decl., Exhibit E, ¶ 9.)  
23 Any and all work performed on air conditioning and refrigeration equipment built and supplied  
24 for U.S. Navy ships by Carrier was performed in accordance with the requirements specified by  
25 the U.S. Navy, and that work was reviewed, inspected, tested and approved by U.S. Navy  
26 personnel before use on military ships. (Horne Decl., Exhibit D, ¶ 5.)

1           20.     Moreover, United States Naval Machinery Inspectors were stationed on-site at  
2 manufacturing facilities to personally oversee each phase of the manufacturing process and to  
3 enforce compliance with the U.S. Navy design specifications. (Horne Decl., Exhibit D, ¶ 8;  
4 McCaffery Decl., Exhibit E, ¶ 10.) The U.S. Navy had direct and detailed control over every  
5 aspect of the design and manufacture of the air conditioning and refrigeration equipment, and it  
6 did not permit any deviations from its specifications. In fact, if any material, feature or  
7 component of the equipment failed to comply with the applicable military specifications, it  
8 would have been rejected. (McCaffery Decl., Exhibit E, ¶ 10.)

9           21.     Virtually no aspect of the design and manufacture of the air conditioning and  
10 refrigeration equipment escaped the close supervision and control of the U.S. Navy and its  
11 officers. (See McCaffery Decl., Exhibit E, ¶ 13.)

12           22.     A causal nexus exists between Plaintiff's claims in this action and the acts taken  
13 by Carrier under the direction of federal officers. Plaintiff's claims against Carrier arise from his  
14 work on and around Carrier air conditioning and refrigeration equipment aboard U.S. Navy  
15 ships. The air conditioning and refrigeration equipment were designed and manufactured  
16 pursuant to precise military specifications provided by the U.S. Navy, and were built under the  
17 detailed and direct control of federal officers. Carrier's actions, then, are inseparable from the  
18 government specifications, regulations, and oversight, and a clear causal nexus exists between  
19 Plaintiff's claims and Carrier's acts performed under color of federal office. *See Boyle v. United*  
20 *Technologies Corp.*, 487 U.S. 500, 108 S.Ct. 2510 (1988); *Sundstrom v. McDonnell Douglas*  
21 *Corp.*, 816 F.Supp. 587 (N.D. Cal. 1993); *Fung v. Abex Corp.*, 816 F.Supp. 569 (N.D. Cal.  
22 1992); *Pack v. AC and S, Inc.* 838 F. Supp. 1099 (D. Md. 1993); *Crocker v. Borden* 852 F.Supp.  
23 1322 (E.D. La. 1994); *Arness v. Boeing North American, Inc.*, 997 F.Supp. 1268 (C.D. Cal.  
24 1998).

25           23.     Plaintiff's claims against Carrier are affirmatively barred by government  
26 contractor immunity as stated by the U.S. Supreme Court in *Boyle v. United Technologies Corp.*,  
27 487 U.S. 500, 108 S.Ct. 2510 (1988), and by the Ninth Circuit Court of Appeals in *McKay v.*

1 *Rockwell International Corp.*, 704 F.2d 444 (9th Cir. 1983). Pursuant to this federal defense,  
2 military equipment manufacturers, such as Carrier, cannot be held liable under state law for any  
3 injuries caused by the equipment it built for the U.S. Navy when: (1) the United States approved  
4 reasonably precise specifications; (2) the equipment conformed to these specifications; and (3)  
5 the equipment supplier warns the military about any hazards involved in the use of the  
6 equipment that are known to the equipment supplier but not known to the military. See *Boyle*,  
7 *supra*, 487 U.S. 500 at 512; *McKay, supra*, 704 F.2d. 444 at 451; *Sundstrom, supra*, 816 F.Supp.  
8 587 at 596-97.

9       24. Here, Carrier has raised a colorable federal defense to this action under  
10 government contractor immunity. Carrier designed and manufactured air conditioning and  
11 refrigeration equipment pursuant to precise specifications provided and approved by the U.S.  
12 Navy, (2) the air conditioning and refrigeration equipment conformed to those specifications, and  
13 (3) the U.S. Navy, one of the world's leaders in industrial hygiene concerns, would have  
14 possessed information equal to or superior to that of Carrier concerning issues of industrial  
15 hygiene and asbestos medicine, including the potential hazards involved with use of asbestos-  
16 containing components or materials associated with air conditioning and refrigeration equipment  
17 or other Naval equipment. Thus, Carrier would not have had knowledge of any hazards  
18 associated with the use of the equipment which was not already known to the U.S. Navy. In fact,  
19 the U.S. Navy already had its own precautions and training programs regarding the use of  
20 asbestos-containing materials. Carrier has more than a colorable federal defense to this state  
21 action under government contractor immunity. See *Boyle, supra*, 487 U.S. at 512; *Sundstrom v.*  
22 *McDonnell Douglas Corp.*, 816 F.Supp. 587 (N.D. Cal. 1993); *Fung v. Abex Corp.*, 816 F.Supp.  
23 569 (N.D. Cal. 1992); *Pack v. AC and S, Inc.* 838 F. Supp. 1099 (D. Md. 1993); *Crocker v.*  
24 *Borden* 852 F.Supp. 1322 (E.D. La. 1994); *Arness v. Boeing North American, Inc.*, 997 F.Supp.  
25 1268 (C.D. Cal. 1998).



1           25.     The existence of a single removable claim allows removal of the entire action. 28  
2 U.S.C. § 1441(c). *National Audubon Society v. Dept. of Water*, 496 F.Supp. 499, 509 (E.D. Cal.  
3 1980).

4           26.     Notice of this removal has been filed with the state court and provided to all  
5 adverse parties pursuant to 28 U.S.C. § 1446(d).

6           27.     This removal is based upon this Notice of Removal to the United States District  
7 Court, the Certificate of Service of Notice to Adverse Party of Removal, the Notice to Adverse  
8 Party of Removal filed in the state court action, the Tag-Along Pleading filed herewith, the  
9 Notice of Pendency of Other Action, the pleadings served on Carrier in the state court case, and  
10 any other matters which the court deems applicable.

11           WHEREFORE, defendant Carrier prays that this action be removed from the Superior  
12 Court of the State of California for the County of San Francisco to the United States District  
13 Court for the Northern District of California, and transferred to the United States District Court,  
14 Eastern District of Pennsylvania, for coordinated or consolidated pretrial proceedings pursuant to  
15 28 U.S.C. § 1407 ("MDL Transfer Order").

16  
17 DATED: June 21, 2008

TUCKER ELLIS & WEST LLP

18  
19  
20 By: 

Evan C. Nelson  
Lillian C. Ma  
Attorneys for Defendant  
CARRIER CORPORATION